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Case Law Report

Case Law of the Court of Justice of the European Union and the General Court

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Overview of the Judgments

1 On the Concepts of 'Waste' and Shipment of 'Waste' in the Consumerist Society

Judgment of the Court (Second Chamber) of 4 July 2019 in Case C-624/17 – *Tronex BV*

1.1 *Subject Matter*

This request for a preliminary ruling concerns the interpretation of Article 2(1) of Regulation (EC) No 1013/2006 on shipments of waste (the Basel Regulation), read in conjunction with Article 3(1) of Directive 2008/98/EC on waste (the New Waste Directive). The request has been made in criminal proceedings against Tronex BV, which is charged with having shipped a consignment of

1 Only opinions, judgements and orders available on Curia.eu under the subject matter ´environment´, 'energy' and 'provisions concerning the institutions/access to documents' have been included in this report. Due to length constrains, only those proceedings that in the subjective opinion of the editor were considered interesting are included.

waste from the Netherlands to Tanzania. Interestingly, the shipment in question comprised, on the one hand, appliances returned by consumers under the relevant product guarantee and, on the other hand, articles which, for example, had left the product range following a change in that range. Some appliances were defective. The shipment took place without the notification or consent referred to in the Basel Regulation. Tronex was fined accordingly. In appeal, the Dutch Court of Appeal of The Hague wanted to know in essence, whether such a shipment is to be regarded as a 'shipment of waste' within the meaning of the Basel Regulation and the New Waste Directive.

1.2 *Key Findings*

32 First, as regards the redundant articles in the product range of the retailer, wholesaler or importer that were still in their unopened original packaging, it may be considered that those are new products that were presumably in working condition. Such electrical equipment can be considered to be market products amenable to normal trade and which, in principle, do not represent a burden for their holder, in accordance with the case-law cited in paragraph 22 of the present judgment.

34 Second, as regards the electrical appliances returned under the product guarantee, it should be stated that goods that have undergone a return transaction carried out in accordance with a contractual term and in return for the reimbursement of the purchase price cannot be regarded as having been discarded. Where a consumer effects such a return of non-compliant goods with a view to obtaining a reimbursement of them under the guarantee associated with the sale contract of those goods, that consumer cannot be regarded as having wished to carry out a disposal or recovery operation of goods he had been intending to 'discard' within the meaning of Article 3(1) of Directive 2008/98. Moreover, it is appropriate to add that, in circumstances such as those in the main proceedings, the risk that the consumer will discard those goods in a way likely to harm the environment is low (see, to that effect, judgment of 12 December 2013, Shell Nederland, C-241/12 and C-242/12, EU:C:2013:821, paragraph 46).

36 If, however, such an appliance suffers defects that require repair, such that it cannot be used for its original purpose, that appliance constitutes a burden for its holder and must thus be regarded as waste, in so far as there is no certainty that the holder will actually have it repaired. As the European Commission noted in its written observations, the existence of doubts as to whether goods will still be able to be sold so as to be used for their original purpose is determinant as regards its classification as 'waste'.

43 In view of the foregoing considerations, the answer to the questions asked is that the shipment to a third country of a consignment of electrical and

electronic appliances, such as those at issue in the main proceedings, which had been initially intended for retail sale but which were returned by the consumer or which, for various reasons, were sent back by the retailer to its supplier, is to be regarded as a 'shipment of waste' within the meaning of Article 1(1) of Regulation No 1013/2006, read in conjunction with Article 2(1) thereof, and Article 3(1) of Directive 2008/98, where that consignment contains appliances the good working condition of which has not been previously ascertained or which are not adequately protected from transport damage. Such goods which have become redundant in the seller's product range and which are in their unopened original packaging, on the other hand, must not, without indications to the contrary, be regarded as waste.

2 On the Duty to Have a Permit for Operating Landfills

Judgment of the Court (Tenth Chamber) of 11 July 2019 in Joined Cases C-180/18, C-286/18 and C-287/18 – *Agrenergy Srl* (*C-180/18 and C-286/18*) *and Fusignano Due Srl* (*C-287/18*)

2.1 *Subject Matter*

These requests for a preliminary ruling concern the interpretation of Article 3(3)(a) of Directive 2009/28/EC on the promotion of the use of energy from renewable sources (the Renewable Energy Sources Directive). The requests have been made in proceedings between Agrenergy Srl (Cases C-180/18 and C-286/18) and Fusignano Due Srl (Case C-281/18) and the Ministero dello Sviluppo Economico (Ministry for Economic Development, Italy) concerning the lawfulness of a ministerial decree reducing the incentive for the productions of electricity using photovoltaic plants. The Italian Council of State, hearing the case in appeal, wanted to know, in essence, whether Article 3(3)(a) of the Renewable Energy Sources Directive, read in the light of the principles of legal certainty and the protection of legitimate expectations, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which allows a Member State to provide for the reduction, or even the removal, of incentive rates for energy produced by solar photovoltaic plants which were introduced previously.

2.2 *Judgment*

Subject to verifications to be carried out by the referring court taking into account all the relevant factors, Article 3(3)(a) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of

the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, read in the light of the principles of legal certainty and the protection of legitimate expectations, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows a Member State to provide for the reduction, or even the removal, of incentive rates for energy produced by solar photovoltaic plants which were introduced previously.

3 On the Concept of 'Project' under the EIA Directive, under the Habitats Directive and on the Applicability of the Espoo and Aarhus Conventions Classification of a Substance as Waste or Hazardous Waste under the New Waste Directive

Judgment of the Court (Grand Chamber) of 29 July 2019 in Case C-411/17 – *Inter-Environnement Wallonnie ASBL, and Bond Beter Leefmilieu Vlaanderen ASBL*

3.1 *Subject Matter*

This request for a preliminary ruling concerns the interpretation of the concept of 'project' under Directive 2011/92/EU (the EIA Directive), and or 'plan or project' under Council Directive 92/43/EEC (the Habitats Directive). It also concerns the applicability of the Espoo Convention as regards the provisions on the performance of transboundary environmental impact assessment, and of the Aarhus Convention as regards the provisions on public participation. The request has been made in proceedings between Inter Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL, on the one hand, and the Conseil des ministres (Council of Ministers, Belgium), on the other, in relation to legislation whereby the Kingdom of Belgium, first, provided for the restarting of industrial production of electricity, for a period of almost 10 years, at a nuclear power station that had previously been shut down, and second, for deferral by 10 years of the date initially set for deactivating and ceasing industrial production of electricity at an active nuclear power station. As the Belgian Government had approved such activities by means of national legislation, the Belgian Constitutional Court decided to stay the proceedings and refer to the Court of Justice several questions.

3.2 *Judgment*

1. The first indent of Article 1(2)(a), Article 2(1) and Article 4(1) of Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on the assessment of the effects of certain public and private

projects on the environment must be interpreted as meaning that the restarting of industrial production of electricity for a period of almost 10 years at a nuclear power station that had previously been shut down, with the effect of deferring by 10 years the deadline initially set by the national legislature for deactivating and ceasing production at that power station, and deferral, also by 10 years, of the date initially set by the legislature for deactivating and ceasing industrial production of electricity at an active power station, measures which entail work to upgrade the power stations in question such as to alter the physical aspect of the sites, constitute a 'project', within the meaning of that directive, and subject to the findings that are for the referring court to make, an environmental impact assessment must, in principle, be carried out with respect to that project prior to the adoption of those measures. The fact that the implementation of those measures involves subsequent acts, such as the issue, for one of the power stations in question, of a new specific consent for the production of electricity for industrial purposes, is not decisive in that respect. Work that is inextricably linked to those measures must also be made subject to such an assessment before the adoption of those measures if its nature and potential impact on the environment are sufficiently identifiable at that stage, a finding which it is for the referring court to make.

2. Article 2(4) of Directive 2011/92 must be interpreted as meaning that a Member State may exempt a project such as that at issue in the main proceedings from the requirement to conduct an environmental impact assessment in order to ensure the security of its electricity supply only where that Member State can demonstrate that the risk to the security of that supply is reasonably probable and that the project in question is sufficiently urgent to justify not carrying out the assessment, subject to compliance with the obligations in points (a) to (c) of the second subparagraph of Article 2(4) of that directive. However, that possibility of granting an exemption is without prejudice to the obligations incumbent on the Member State concerned under Article 7 of that directive.
3. Article 1(4) of Directive 2011/92 must be interpreted as meaning that national legislation such as that at issue in the main proceedings is not a specific act of national legislation, within the meaning of that provision, that is excluded, by virtue of that provision, from the scope of that directive.
4. Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that measures such as those at issue in the main

proceedings, together with the work of upgrading and of ensuring compliance with current safety standards, constitute a project in respect of which an appropriate assessment of its effects on the protected sites concerned should be conducted. Such an assessment should be conducted in respect of those measures before they are adopted by the legislature. The fact that the implementation of those measures involves subsequent acts, such as the issue, for one of the power stations in question, of a new specific consent for the production of electricity for industrial purposes, is not decisive in that respect. Work that is inextricably linked to those measures must also be subject to such an assessment before the adoption of those measures if its nature and potential impact on the protected sites are sufficiently identifiable at that stage, a finding which it is for the referring court to make.

5. The first subparagraph of Article 6(4) of Directive 92/43 must be interpreted as meaning that the objective of ensuring security of the electricity supply in a Member State at all times constitutes an imperative reason of overriding public interest, within the meaning of that provision. The second subparagraph of Article 6(4) of that directive must be interpreted as meaning that if a protected site likely to be affected by a project hosts a priority natural habitat type or priority species, a finding which it is for the referring court to make, only a need to nullify a genuine and serious threat of rupture of that Member State's electricity supply constitutes, in circumstances such as those in the main proceedings, a public security ground, within the meaning of that provision.
6. EU law must be interpreted as meaning that if domestic law allows it, a national court may, by way of exception, maintain the effects of measures, such as those at issue in the main proceedings, adopted in breach of the obligations laid down by Directive 2011/92 and Directive 92/43, where such maintenance is justified by overriding considerations relating to the need to nullify a genuine and serious threat of rupture of the electricity supply in the Member State concerned, which cannot be remedied by any other means or alternatives, particularly in the context of the internal market. The effects may only be maintained for as long as is strictly necessary to remedy the breach.

4 On the Failure to Designate a Site as an Area of Special Conservation under the Habitats Directive

Judgment of the Court (Ninth Chamber) of 5 September 2019 in Case C-290/18 – *Commission v Portugal*

4.1 *Subject Matter*

This case concerns an action for infringement against Portugal for failure to designate 61 sites as an Area of Special Conservation under the Habitats Directive. The Court of Justice upholds the Commission's allegations and condemns Portugal for such failure.

4.2 *Judgment* (*Not Available in English*)

En n'ayant pas désigné comme zones spéciales de conservation 61 sites d'importance communautaire, qui ont été retenus par la Commission européenne dans la décision 2004/813/CE de la Commission, du 7 décembre 2004, arrêtant, en application de la directive 92/43/CEE du Conseil, la liste des sites d'importance communautaire pour la région biogéographique atlantique, et dans la décision 2006/613/CE de la Commission, du 19 juillet 2006, arrêtant, en application de la directive 92/43/CEE du Conseil, la liste des sites d'importance communautaire pour la région biogéographique méditerranéenne, le plus rapidement possible et dans un délai maximal de six ans suivant la date d'adoption de ces décisions, et, en n'ayant pas adopté les mesures de conservation nécessaires qui répondent aux exigences écologiques des types d'habitats naturels visés à l'annexe I de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages, et des espèces visées à l'annexe II de cette directive présents sur ces sites d'importance communautaire, la République portugaise a manqué aux obligations qui lui incombent en vertu de l'article 4, paragraphe 4, et de l' article 6, paragraphe 1, de ladite directive.

5 On the Principle of Solidarity in the Internal Market in Natural Gas

Judgment of the General Court (First Chamber, Extended Composition) of 10 September 2019 in Case T-883/16 – *Poland v Commission*

5.1 *Subject Matter*

This proceedings concern and action for annulment brought by Poland against Commission Decision C(2016) 6950 final on the review of the conditions for exemption of the OPAL pipeline from the rules on third party access and tariff regulation. On 13 March 2009, the German national regulatory authority (BNetzA) notified the European Commission two decisions of 25 February 2009 which exempted the capacities for cross-border transmission of the planned gas pipeline Ostseepipeline-Anbindungsleitung (OPAL) from the application of the rules on third party access laid down in Article 18 of Directive 2003/55 and tariff regulation laid down in Article 25(2) to (4) of

that directive. The OPAL gas pipeline is the terrestrial section, to the west, of the Nord Stream 1 gas pipeline, the point of entry to which is located close to the area of Lubmin, near Greifswald, in Germany, and the point of exit from which is in the area of Brandov in the Czech Republic. The two decisions concerned the respective shares held by the two owners of the OPAL pipeline. By virtue of Commission Decision C(2009) 4694 and the decisions of the BNetzA of 25 February 2009, the capacities of the OPAL pipeline were entirely exempted from application of the rules governing third party access and tariff regulation on the basis of Directive 2003/55. On 13 May 2016, the BNetzA notified the Commission, on the basis of Article 36 of Directive 2009/73, of its intention, following the request submitted by OGT, OAO Gazprom and Gazprom Eksport, to vary certain provisions of the exemption granted in 2009 regarding the share of the OPAL pipeline operated by OGT by concluding with the latter a public law contract, which, under German law, is equivalent to an administrative decision. As to the substance, by Commission Decision C(2016) 6950 final (the contested decision) the Commission approved the variations to the exemption regime proposed by the BNetzA, subject to certain amendments. Poland challenges this decision on several grounds, among which, infringement of Article 36(1)(a) of Directive 2009/73, read in conjunction with Article 194(1)(b) TFEU and the principle of solidarity. The General Court agrees with Poland.

5.2 *Key Findings*

69 The 'spirit of solidarity' referred to in Article 194(1) TFEU is the specific expression in this field of the general principle of solidarity between the Member States, mentioned, inter alia, in Article 2 TEU, in Article 3(3) TEU, Article 24(2) and (3) TEU, Article 122(1) TFEU and Article 222 TFEU. That principle is at the basis of the whole Union system in accordance with the undertaking provided for in Article 4(3) TEU (see, to that effect, judgment of 10 December 1969, Commission v France, 6/69 and 11/69, not published, EU:C:1969:68, paragraph 16).

72 On the contrary, the principle of solidarity also entails a general obligation on the part of the European Union and the Member States, in the exercise of their respective competences, to take into account the interests of the other stakeholders.

73 As regards, more specifically, the energy policy of the European Union, that policy requires the European Union and the Member States to endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures liable to affect the interests of the European Union and the other Member States, as regards security of supply, its economic and political viability, the diversification of supply or of sources of

supply, and to do so in order to take account of their interdependence and de facto solidarity.

77 The application of the principle of energy solidarity does not however mean that EU energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in the field of energy. However, the EU institutions and the Member States are obliged to take into account, in the context of the implementation of that policy, the interests of both the European Union and the various Member States and to balance those interests where there is a conflict.

78 Having regard to the scope of the principle of solidarity, the Commission was required, in the context of the contested decision, to assess whether the variation to the regime governing the operation of the OPAL pipeline, as proposed by the German regulatory authority, could affect the interests in the field of energy of other Member States and, if so, to balance those interests with the interests that that variation had for the Federal Republic of Germany and, if relevant, the European Union.

79 It is clear that the examination referred to in paragraph 78 above was lacking in the contested decision. The principle of energy solidarity was not only not mentioned in the contested decision, but also the decision itself does not disclose that the Commission did, as a matter of fact, carry out an examination of that principle.

83 Accordingly, it must be held that the contested decision was adopted in breach of the principle of energy solidarity, as provided for in Article 194(1) TFEU.

85 In the light of the foregoing the action must be upheld and the contested decision must be annulled.

6 On the Authorisation of Placing on the Market of a Genetically Modified Soybean

Judgment of the Court (Third Chamber) of 12 September 2019 in Case C-82/17 P – *TestBioTech eV v Commission*

6.1 *Subject Matter*

This case concerns an appeal brought by TestBioTech eV, and others against the judgment of the General Court in T-177/13 (EU:T:2016:736), by which the General Court dismissed their action for annulment of the Commission decision of 8 January 2013 concerning the internal review of Commission Implementing Decision 2012/347/EU of 28 June 2012 authorising the placing on the market of products containing, consisting of, or produced from genetically

modified soybean MON 87701 x MON 89788 (MON-877Ø1-2 x MON-89788-1) pursuant to Regulation (EC) No 1829/2003. The Court of Justice rejects the appeal.

6.2 *Judgment*

Dismisses the appeal

7 On the Failure by Spain to Comply with Obligations Concerning River Basis Plans under the Water Framework Directive

Judgment of the Court (Seven Chamber) of 26 September 2019 in Case C-556/18 – *Commission v Spain*

7.1 *Subject Matter*

This case concerns an action for infringement against Spain for breach of Articles 13 and 14 of Directive 2000/60/EC (the Water Framework Directive) as regards the setting up of river basis plans for seven hydrological areas. The Court of Justice condemns Spain for such failures.

7.2 *Judgment* (*Not Available in English*)

En n'ayant pas mené à bien, dans le délai prescrit, l'information et la consultation du public sur la révision et la mise à jour des plans de gestion des districts hydrographiques de Lanzarote, Fuerteventura, Gran Canaria, Tenerife, La Gomera, La Palma et El Hierro, et en n'ayant pas, dans le délai prescrit, adopté, publié et communiqué à la Commission européenne la révision et la mise à jour de ces plans de gestion, le Royaume d'Espagne a manqué aux obligations qui lui incombent en vertu de l'article 13, paragraphe 7, lu conjointement avec l'article 13, paragraphe 1, de l'article 14 et de l'article 15, paragraphe 1, de la directive 2000/60/CE du Parlement européen et du Conseil, du 23 octobre 2000, établissant un cadre pour une politique communautaire dans le domaine de l'eau, telle que modifiée par la directive 2013/64/UE du Conseil, du 17 décembre 2013.

8 On the Inability to Contain Xylella Fastidiosa Epidemic

Judgment of the Court (Fifth Chamber) of 5 September 2019 in Case C-443/18 – *Commission v Italy*

8.1 *Subject Matter*

This case concerns an action for infringement against Italy for breach of Commission Implementing Decision (EU) 2015/789 establishing measures to prevent the introduction into and the spread within the Union of Xylella fastidiosa. This organism already caused the death of many olive tries in Puglia, Italy, but also outside this region. Italy should have removed any olive tree within a radius of 20 Km from the infected area, but failed to do so. It hence failed to halt the Xylella fastidiosa epidemic. With this action the Commission requests the Court of Justice to ascertain Italy's failure in this regard, as well as the failure to monitor the status of the pandemic. The Court accepts the Commission allegations.

8.2 *Judgment* (*Not Available in English*)

1) La République italienne,

– en omettant de veiller, dans la zone d'enrayement, à ce qu'il soit procédé immédiatement à l'enlèvement d'au moins tous les végétaux dont l'infection par Xylellafastidiosa a été constatée s'ils sont situés dans la zone infectée, à une distance maximale de 20 kilomètres de la démarcation entre cette zone infectée et le reste du territoire de l'Union, a manqué aux obligations qui lui incombent en vertu de l'article 7, paragraphe 2, sous c), de la décision d'exécution (UE) 2015/789 de la Commission, du 18 mai 2015, relative à des mesures visant à éviter l'introduction et la propagation dans l'Union de Xylellafastidiosa(Wells et al.), telle que modifiée par la décision d'exécution (UE) 2016/764 de la Commission, du 12 mai 2016, et

– en omettant de garantir, dans la zone d'enrayement, la surveillance de la présence de Xylellafastidiosa en menant des enquêtes annuelles à des moments opportuns de l'année, a manqué aux obligations qui lui incombent en vertu de l'article 7, paragraphe 7, de cette décision d'exécution.

2) Le recours est rejeté pour le surplus.